GLEN WAVERLEY SDN BHD

v.

PENGARAH TANAH DAN GALIAN, NEGERI SELANGOR & ANOR

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[ORIGINATING MOTION NO: 25-37-1996]
20 JULY 2001

LAND LAW: *Ownership - Alienation of State land - Letter of alienation issued by Executive Councilors of State - Whether must be complied with - Whether ownership vested in applicant - Land authority refusing to deliver issue document of title - Whether land authority acted ultra vires - Whether in breach of doctrine of legitimate expectation - National Land Code 1965, ss. 16, 116, 418A*

ADMINISTRATIVE LAW: *Remedies - Mandamus - Alienation of State land - Land alienated to applicant - Land authority refusing to deliver issue document of title - Whether land authority acted ultra vires - Doctrine of legitimate expectation - Whether applicable - Whether mandamus to issue - Courts of Judicature Act 1964, para. 1 of Schedule - Specific Relief Act 1950, s. 44 - Rules of the High Court 1980, O. 53*

The applicant had entered into a joint-venture agreement ('JVA') with the Selangor State Government ('the State Government') for the development of a piece of land ('the land') in the state. By the terms of the JVA, and the letter of alienation affixed thereto, the State Government would alienate the land to the applicant, whereupon the applicant would surrender the same to the first respondent who would, upon payment of the prescribed dues: (i) re-alienate the land to the applicant in accordance with the approved layout plan; and (ii) issue individual titles in respect of the sub-divided lots.

It was not in dispute that the layout plan had been approved by the State Government planner and that the applicant had paid all dues in respect of the land. That notwithstanding, the first respondent refused to deliver separate issue documents of title in respect of two sub-divided lots, namely lots for a school and for a clinic and community hall respectively ('the sub-divided portions'). The applicant appealed to the Menteri Besar, whereupon the first respondent, treating the appeal as an application to vary the conditions of alienation, imposed new obligations and conditions on the applicant. In the meanwhile, the State Government alienated the school portion to the second respondent. Dissatisfied, the applicant applied for *mandamus* seeking to enforce its rights of ownership to the land and to obtain the relevant documents of title.

The primary issues that arose were: (i) whether, in denying title to the applicant, the first respondent had acted *ultra vires* and in breach of the doctrine of legitimate expectation; (ii) whether the school portion was unlawfully alienated to the second respondent; and (iii) whether *mandamus* was available to the applicant and ought to issue.

Held:

[1] The facts showed that upon the applicant paying the relevant dues, the issue document of title for the land was given to the applicant to whom the land had therefore been alienated. It follows that ownership of the land had thereby been vested in the applicant, which means that, from that point in time, it was no longer State land. (p 172 d)

[2] The letter of alienation was issued pursuant to a decision of the Executive Council of the State Government, and as such the decision must be meticulously complied with, more so when the applicant has paid and the first respondent has collected the premium for the school portion. It ought also to be noted that upon subdivision of the land, the category of land was expressed to be "building", and "building" under s. 116(4)(d) National Land Code 1965 includes building for the purposes of providing educational facilities. In the circumstances, individual titles must be given in respect of all the individual lots including that of the school portion. (p 173 a-d)

[3] There was in effect no application by the applicant for alienation or variation. In the absence of an application by the applicant for new alienation or variation of conditions, the first respondent could not impose new conditions or new premium at current valuation. (p 175 b-c)

[3a] In any case, the appeal to the Menteri Besar could not deprive the applicant of its ownership or proprietary interest in the land. The concepts of waiver and abandonment, which are applicable in private law, do not apply in public law or to matters governed by a statutory regime such as the alienation of land under the National Land Code. (p 175 d)

[4] In line with the doctrine of legitimate expectation, the first respondent ought to give adequate prior notice to the applicant before effectuating any change to the obligations of the applicant, more particularly so when the first respondent purported to deprive or deny the applicant of the ownership of the land. In the instant case, the purported attempt by the first respondent to modify the applicant's rights without the applicant's

consent or without giving the applicant the opportunity to present its views, contravened the doctrine of legitimate expectation. (pp 174 i & 175 a)

[5] Since the ownership of the land had been vested in the applicant, and since the land had ceased to be state land, the purported alienation to the second respondent could not be legal or lawful. Such purported alienation was an error of law and was indeed a nullity and void. (p 175 h-i)

[6] The first respondent was under an obligation to issue individual titles to all the approved subdivided lots to the applicant. On the facts, the applicant had sufficient interest and locus to apply for and obtain an order of *mandamus*, either under para. 1 of the Schedule to the Courts of Judicature Act 1964 and O. 53 Rules of the High Court 1980 or pursuant to s. 44 of the Specific Relief Act 1950. (p 176 d-e)

Per curium:

[1] The alternative remedy of appeal under s. 418 National Land Code is inapplicable as the rights of the applicant herein arise out of and are to be determined by reference to the JVA and letter of alienation and what is required to be done is purely a ministerial act of implementing the terms and the obligations undertaken by the first respondent. (p 177 h-i)

[Application allowed.]

Case(s) referred to:

A-G For New South Wales v. Quin [1990] 93 ALR 1 ***(refd)***

A-G Of Hong Kong v. Ng Yuen Shiu [1983] 2 All ER 346 ***(refd)***

Government Of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractore Ltd [1997] 2 CLJ 104 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan And Another Appeal [1997] 1 CLJ 665 ***(refd)***

Kuluwante (An Infant) v. Government Of Malaysia & Anor [1978] 1 MLJ 92 ***(refd)***

Land Executive Committee Of Federal Territory v. Syarikat Harper Gilfillan Bhd [1981] 1 MLJ 234 ***(refd)***

Lim Kui Siam & Anor (Representing All The Members Of Persatuan Penduduk-penduduk Kawasan Hj Manan, Kluang) v. Pentadbir Tanah, Daerah Kluang [1995] 1 CLJ 846 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd [1999] 3 CLJ 65 ***(refd)***

Manggai v. Government Of Sarawak & Anor [1970] 2 MLJ 41 ***(refd)***

O'Reilly v. Mackman & Ors And Other Cases [1982] 3 All ER 1124 ***(refd)***

Pioneer Aggregates (UK) v. Secretary Of State For The Environment [1984] 2 EGLR 183 ***(refd)***
R v. Devon County Council, ex p Baker & Anor [1995] 1 All ER 73 ***(refd)***
R v. Liverpool Taxi Owners' Association [1972] 2 All ER 589 ***(refd)***
R v. Rochdale Metropolitan BC, ex p Scheme T [1993] 1 FCR 306 ***(refd)***
R v. Secretary Of State For The Home Department, ex p Khan [1985] 1 All ER 40 ***(refd)***
R v. Secretary Of State For The Home Department, ex p Ruddock & Others [1987] 2 All ER 518 ***(refd)***
R v. Secretary Of State For The Home Department, ex p Swati [1986] 1 All ER 717 ***(refd)***
Schmidt And Another v. Secretary Of State For Home Affairs [1969] 1 All ER 904 ***(refd)***
Semantan Estate (1952) Sdn Bhd v. Collector Of Land Revenue Wilayah Persekutuan [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 ***(refd)***
Sykt Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v. Majlis Perbadanan Pulau Pinang [1996] 3 CLJ 335 ***(refd)***
Tan Chiw Thoo v. Tee Kim Kuay [1997] 1 CLJ 541 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, para 1 to sch
National Land Code, ss. 16, 116(4)(d), 418
Rules of the High Court 1980, O. 53
Specific Relief Act 1950, s. 44

Other source(s) referred to:
MP Jain, *Administrative Law In Malaysia & Singapore*, [1997], 3rd edn, pp 652-653

For the applicant - Dato' RR Sethu; M/s RR Sethu
For the 1st respondent - Kamarolzaman Abideen, Penolong Penasihat Undang-undang Negeri Selangor

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:

Application

This application by way of originating motion filed by the applicant in encl. (26), as amended to include the second respondent, prays for:

(a) an order of *mandamus* directing the Petaling District Land Administrator forthwith to deliver to the applicant separate issue documents of title in respect of PT No. 15093 for use as a school and the subdivided portions in the approved layout plan No. JPBD/B9/102/90/PD designated for use as clinic and "dewan orang ramai" (community hall) in the Mukim and District of Petaling in accordance with the terms of the letter of alienation dated 5 June 1989 reference No. (8) dlm PTDP2/8P892/89 ("letter of alienation");

(b) further or consequential direction and orders as may seem just; and

(c) costs to be paid by the first respondent to the applicant.

Parties

The applicant is a licensed housing developer while the first respondent is the Selangor director of lands and mines, who is sued in his representative capacity as representing the State Authority under s. 16 of the National Land Code ("NLC"). For the purposes of this judgment, unless the context otherwise requires, the expression "first respondent" shall include the State Authority and all its officers and functionaries charged with the responsibilities for land matters in the State of Selangor.

The second respondent is the Federal Lands Commissioner, to whom the subject land ("school portion") had been alienated. However, the second respondent has not taken any steps in these proceedings.

Brief Factual Background

There is no dispute by the parties herein as to the factual background. Briefly, the applicant and the Selangor State Government ("the State Government") had entered into a joint venture agreement ("JVA") for the development of a piece of land measuring 50 acres ("the land"). The letter of alienation was annexed to the JVA. The letter of alienation provides for the surrender, subdivision and issue of subdivided titles for the lots shown in the subdivision plan approved by the Government planner ("the planner").

The subject matter of the present dispute involves two of the subdivided portions, namely, the school portion, clinic and the "dewan orang ramai" (community hall) ("the subdivided portions"). The applicant claims that the applicant is the owner of these subdivided portions while the first respondent claims that the letter of alienation was incomplete in that the premium had not been provided for in the letter of alienation and hence no title could be issued.

There are two further developments: the applicant claims that it was advised to "appeal" to the Selangor Menteri Besar ("the Menteri Besar") and that appeal was treated by the first respondent as an application for a variation of the conditions of alienation resulting in the imposition of new conditions and a subsequent application for re-alienation.

The applicant's primary contention is that the first respondent had acted *ultra vires* and in breach of the doctrine of legitimate expectation in denying title to the applicant for the two subdivided portions and that the issue of the titles is a mere ministerial act.

Chronology Of Events

The parties herein also do not dispute the following chronology of events:

Date	Event
12 December 1990	the planner approved the layout plan
18 December 1990	the precomp plans for the issue of titles were submitted
12 January 1991	the planner approved the precomp plans with comments
29 July 1991	applicant's surveyor had requested PT Number for 616 titles and applicant paid the premium for the school portion and the State collected quit rent for the school portion
24 December 1991	applicant sought title for the school portion
17 August 1992	Form 5A was sent for new premium as if it was new alienation
12 December 1992	applicant wrote to the Menteri Besar seeking title
29 January 1993	applicant sought reduction of premium to be consistent with letter of alienation
15 February 1995	request for reduction was rejected
14 June 1995	Land office notified applicant of the rejection of request for reduction
27 July 1995	applicant sent new premium in order to challenge later. This was rejected as paid out of time.

The Issues For Determination

By consensus of parties, the issues for determination by the court are:

1. Whether the applicant is entitled to the title to the school portion, the clinic and the dewan orang ramai (community hall) portion of the land?
2. Whether the applicant had applied for a new alienation of the land for the school portion?

3. Was the State Authority entitled to impose new conditions in the applicant's 'appeal' for the school portion?

4. Did the State Authority act lawfully in alienating the school portion to the second respondent?

5. Whether the remedy of *mandamus* is available and ought to issue in this case?

Submission For Applicant

Dato' RR Sethu, learned counsel for the applicant, is of the view that the JVA establishes the applicant's ownership in the land which had been alienated to the applicant to whom the first respondent had given the issue document of title as the applicant has paid all relevant dues. This, he submitted, has been clearly stated in the letter of alienation, the terms of which are binding on the the first respondent. Further, he contended that quit rent and premiums payable for the subdivision of the land had been paid and that the category of land use was "building" which in his submission includes the school portion. In the circumstances, he said that the first respondent should not change its obligations without giving adequate notice to the applicant who has a legitimate expectation to be heard.

It was argued for the applicant that the applicant has never applied for a new alienation in its appeal to the Menteri Besar but was instead applying for the title to the school portion. Such appeal, he added, does not deprive the applicant of its proprietary interest in the land as the concepts of waiver and abandonment have no application in public law pertaining to alienation and ownership of land in the instant case.

It was canvassed for the applicant that the first respondent has imposed new conditions in the applicant's appeal to the Menteri Besar when there was no new alienation. He stressed that the first respondent's alienation of the school portion to the second respondent is an abuse of authority and that explains why the second respondent is not defending these proceedings. He prays for an order in terms of the appliction herein.

First Respondent's Contention

On the question of the ownership of the land, Encik Kamarolzaman bin Abideen, learned assistant legal adviser, Selangor, for the first respondent, argued that the applicant is not entitled to the school portion, as the alienation is subject to such conditions as "perumahan" (housing) and the land is to be realienated (diberimilik semula), subject to certain conditions, and that the letter of alienation totally fails to mention other types of buildings e.g. school hospital or community hall.

He added that the provisions of the JVA have limited the buildings to residential and commercial buildings which, in his view, do not include the school, hospital or community hall.

It is also submitted for the first respondent that the applicant has applied to the Menteri Besar for private hospital and school, subject to payment of additional premium which the applicant has failed to pay within the stipulated time, as a result of which the applicant has lost the right to the school portion. In the circumstances, he subscribed to the view that new conditions may be imposed for the school portion.

The first respondent further contended that its alienation of the school portion to the second respondent is lawful as there was no denial of natural justice by virtue of the fact that the applicant was given the opportunity to make the necessary payment for premium but the applicant has failed to do so.

The learned assistant legal adviser stressed that this is not a case where *mandamus* is available to the applicant, as the applicant must in the first instance exhaust the alternative remedy such as appeal or local remedy. In support of this view, reliance was placed on *Semantan Estate (1952) Sdn Bhd v. Collector Of Land Revenue Wilayah Persekutuan* [1987] 2 CLJ 199; [1987] CLJ (Rep) 329; *Manggai v. Government Of Sarawak & Anor* [1970] 2 MLJ 41; *Kuluwante (An Infant) v. Government Of Malaysia & Anor* [1978] 1 MLJ 92; *Land Executive Committee Of Federal Territory v. Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234; *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 457; [1987] CLJ (Rep) 110; *Lim Kui Siam & Anor (Representing All The Members Of Persatuan Penduduk-Penduduk Kawasan Hj Manan, Kluang) v. Pentadbir Tanah, Daerah Kluang* [1995] 1 CLJ 846.

It is also argued for the first respondent that land is the prerogative of the first respondent and that there is no basis for the applicant's legitimate expectation as the alienation letter and JVA are subject to certain terms and conditions. Hence the first respondent urges the court to dismiss the application herein with costs.

Decision Of The Court

Although the parties have enumerated five issues for determination by the court, these issues do to some extent overlap and so the grounds given under these issues are not intended to be compartmentalised but are applicable *mutatis mutandis* as the context of this judgment may require.

Ownership

The issue of ownership of the land constitutes a pivotal point here and may be determined by reference to the JVA and the letter of alienation. Pursuant to the JVA, 50 acres of land would be and had indeed been alienated to the

applicant, the terms and conditions of alienation being set out in the letter of alienation. A reference to a clause number in this judgment is a reference to that clause in the JVA.

Under cl. 14, the State Government must register and issue document or documents of title for the land in favour of the applicant, while cl. 15 obliges the applicant to pay all rates and taxes for the land. The applicant must submit a development plan under cl. 2. The JVA is to be performed in good faith, fairness and without detriment to either party under cl. 28. The JVA is, pursuant to cl. 30, binding on the parties and their respective successors in title and permitted assigns.

Upon the applicant paying the relevant dues, the issue document of title for the land was given to the applicant to whom the land had therefore been alienated. It follows that ownership of the land had thereby been vested in the applicant, which means that, from that point in time, it was no longer state land. Any alienated land of which the land is an example can only revert to the state in accordance with the law e.g. by acquisition, surrender or forfeiture for breach of conditions, but this was not to be the case here.

The vesting of ownership in the applicant is further strengthened by the letter of alienation which contains provisions, *inter alia*, for surrender, subdivision and category of use. Respective learned counsel for the applicant and for the first respondent attached overwhelming importance to para. 1.4 at p. 3 of the letter of alienation, the relevant portion of which was also relied upon by them and therefore merits reproduction as follows:

> Setelah Suratan hakmilik Blok diserahkan kepada Kerajaan, diberimilik semula tanah yang sama kepada pemaju mengikut pelan tatatur yang dipersetujui oleh Pengarah Bandar dan Kampong Negeri Selangor dan hakmilik berasingan dikeluarkan bagi lot-lot yang terdapat dalam pelan tatatur itu dengan dikenakan syarat-syarat dan bayaran yang berikut.

[Translation: After the Block Document of Title has been surrendered to the Government, the same land is to be realienated to the developer according to the layout plan as agreed by the Director of Town and Country Planning, State of Selangor and individual titles are to be issued for the lots as found in the layout plan, with the imposition of the following conditions and payment.]

Condition 1.4 above mandated the formal surrender of the block title to the first respondent for the same land to be realienated to the applicant according to the layout plan as approved by the planner and thereafter individual titles are to be issued for the individual lots as found in the layout plan with the conditions for payment of dues as prescribed in the letter of alienation. In my view, as alluded to above, upon a proper construction of the JVA and the letter

of alienation, ownership of the land has undoubtedly been vested in the applicant. Individual titles must be given in respect of all the individual lots as approved by the planner and such approved individual lots include, *inter alia*, the school portion. In fact, upon subdivision of the land, the category of land use is expressed to be "building" which, under s. 116(4)(d) of the NLC, with effect from 30 May 1985 *vide* Act A615, included buildings for the purposes of providing, *inter alia*, educational, medical, sanitary or other welfare facilities, and the category for "commercial purposes" which existed previously has with effect from the same date been abrogated. These purposes as enacted in s. 116(4)(d) are adequate and comprehensive to cover schools, clinics and community halls. The letter of alienation was as a matter of fact issued pursuant to a decision of the Executive Council of the State Government on 19 April 1989 and so it is beyond question that such decision has to be meticulously complied with by the first respondent, especially, as stated in the agreed facts, it was clear that the applicant has paid and the first respondent has collected the premium for the school portion which had been computed and set out in the letter of alienation. The letter of alienation and the JVA also made it clear that the legal position governing the parties herein is that of a formal surrender by the applicant to the State Government for the purpose of effecting a realienation of the same land to the applicant.

In the event of any purported change of the obligations created by the first respondent, the applicant should in my view be given adequate prior notice in line with the doctrine of legitimate expectation, more particularly so in this case in which the first respondent purported to deprive or deny the applicant of the ownership of the land. The doctrine of legitimate expectation has been formulated in a variety of distinct senses, which are by no means exhaustive. By way of illustration, Simon Brown, LJ in *R v. Devon County Council, ex p Baker And Another* [1995] 1 All ER 73 (which was relied upon by learned counsel for the applicant) has succinctly stated, identified and formulated four distinct senses to cover the following categories:

Category (1)
It is used to denote a substantive right: an entitlement that a claimant asserts cannot be denied to him: *R v. Secretary Of State For The Home Department, ex p Khan* [1985] 1 All ER 40, [1984] 1 WLR 1337; and *R v. Secretary Of State For The Home Department, ex p Ruddock & Others* [1987] 2 All ER 518, [1987] 1 WLR 1482;

Category (2)
It is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). It is the interest rather than the benefit that is the substance of the expectation. The expectation arises not because the claimant asserts any specific right to a benefit but rather because

his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision: *Schmidt And Another v. Secretary Of State For Home Affairs* [1969] 1 All ER 904, [1969] 2 CH 149; *O'Reilly v. Mackman & Others And Other Cases* [1982] 3 All ER 1124, [1983] 2 AC 237; *R v. Rochdale Metropolitan BC, ex p Scheme T* [1993] 1 FCR 306;

Category (3)

It is used to refer to the fair procedure itself ie, the public body will act fairly towards the claimant. However this has been said to be superfluous and unhelpful: per Dawson, J in *A-G For New South Wales v. Quin* [1990] 93 ALR 1 at 39;

Category (4)

It encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it: *R v. Liverpool Taxi Owners' Association* [1972] 2 All ER 589, [1972] 2 QB 299; *A-G Of Hong Kong v. Ng Yuen Shiu* [1983] 2 All ER 346, [1983] 2 AC 629.

Within our own shores, in *Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd* [1999] 3 CLJ 65, FC (also relied upon by the applicant's learned counsel) Edgar Joseph Jr FCJ (in delivering the judgment of the Federal Court), after alluding to a conflict of judicial opinion on the question of whether the concept of legitimate expectations could (in appropriate circumstances) have an impact not merely on procedure but also on the substance of the decision, preferred the view and formulation of Simon Brown, LJ in *ex p Baker*, *supra*. The Federal Court in this appeal has upheld the decision of the judgment of our Court of Appeal, as reported in [1996] 3 CLJ 335 by accepting and applying category (2) of the formulation of legitimate expectation by Simon Brown, LJ above. Both the Court of Appeal and the Federal Court held, *inter alia*, that the Municipal Council of Pulau Pinang should have given advance notice of its intention to impose the disputed condition because the rules of natural justice demanded it.

In the instant case, the purported attempt by the first respondent to modify the applicant's rights without the applicant's consent or without giving the applicant the opportunity to present its views, runs counter to the doctrine of legitimate expectation as used in the distinct sense as formulated by Simon Brown, LJ in category (2) above. This in my view constitutes a breach of

the rules of natural justice. Hence, the answer to issue 1 is that the applicant is entitled to the title to the school portion, the clinic and the dewan orang ramai (community hall).

Realienation Or New Alienation?

The facts of the case show that when the applicant sought title for the school portion, the land office had advised the applicant to appeal to the Menteri Besar. There was in effect no application by the applicant for alienation or variation. Such appeal to the Menteri Besar does not in my view deprive the applicant of its ownership or proprietary interest in the land. I agree with the applicant's contention that the concepts of waiver and abandonment which are applicable in private law, do not apply in public law or to matters governed by a statutory regime such as the alienation or ownership of land under the NLC: see also *Pioneer Aggregates (UK) v. Secretary Of State For The Environment* [1984] 2 EGLR 183 (HL) at p. 184F, L-M, p. 185A and H.

The appeal to the Menteri Besar did not and could not re-vest the applicant's land in the state. There is no question of new alienation. The true legal position is a realienation of the same piece of land to the applicant with all the individual titles for all the individual lots contained in the layout plan. The answer to issue 2 is that the applicant had not applied for a new alienation.

Imposition Of New Conditions

In the absence of an application by the applicant for new alienation or variation of conditions, I am of the view that the first respondent could not impose new conditions or new premium at current valuation. The answer to issue three is that the first respondent is not entitled to impose new conditions.

As alluded to above, this matter was further compounded by the fact that the second respondent has obtained approval for alienation to the school portion which was purportedly given by the executive council. It is significant to note that the second respondent's application was not produced in these proceedings. There was also no affidavit evidence to establish that the document of title has been issued to the second respondent. This leads to the next issue pertaining to the validity or otherwise of the exercise of statutory powers by the first respondent and whether this court should grant an order of *mandamus.*

Exercise Of Statutory Power

In view of my specific finding that the ownership of the land has been vested in the applicant, and has therefore ceased to be state land, the purported alienation to the second respondent cannot by any stretch of imagination be legal or lawful. It is indeed a nullity and void: *Tan Chiw Thoo v. Tee Kim Kuay* [1997] 1 CLJ 541 FC. Much can be said or observed for the second respondent's unwillingness to defend these proceedings or to assert any rights

in the land. The purported alienation to the second respondent is in my view clearly an error of law in its widest sense as expounded by the Court of Appeal in *Sykt Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v. Majlis Perbadanan Pulau Pinang* [1996] 3 CLJ 335, at p. 371 in the following words:

> We use this term in its widest sense and equate it to 'an error of law' as that term is used today to include, *inter alia*, a denial of legitimate expecation, a breach of natural justice or a making of a decision which is irrational and unjust. Such a situation would be 'exceptional or very exceptional' because the objective of the decision-making process is to make lawful decisions within the ambit of the statutory powers conferred.

My answer to issue four is that the first respondent did not act lawfully in alienating the school portion to the second respondent.

Mandamus

The first respondent is pursuant to the letter of alienation under an obligation to issue individual titles to all the approved subdivided lots to the applicant. The applicant may compel the first respondent to do so by obtaining an order of *mandamus* under para. 1 of the schedule to the Courts of Judicature Act 1964 and O. 53 or pursuant to s. 44 of the Specific Relief Act 1950. This has been clearly spelt out by the Court of Appeal in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan And Another Appeal* [1997] 1 CLJ 665 by Gopal Sri Ram, JCA, at p. 740 as follows:

> In my judgment, the wide power conferred by the language of para. 1 of the Schedule [to the Courts of Judicature Act] enables our courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straightjacket. They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant relief as meets the ends of justice.

Siti Norma Yaakob JCA, (now FCJ), also dealt with the issue in the same case at p. 757 as follows:

> Since both the 1980 Rules and the 1950 Act contain provisions for the issue of the order of *mandamus*, I consider that it is open to the respondent to choose under which law he wishes to proceed. Since he has elected to apply for an order of *mandamus* under the Rules, so be it.

The applicant in my view has on the facts of this case sufficient interest and locus (and it is not disputed by the first respondent as to such interest and locus) to apply for and obtain an order of *mandamus*. The applicant is asserting a proprietary interest in the subdivided portions in particular and the land in general.

I accept the following passage pertaining to the true nature, scope and effect of an order of *mandamus* in the latest (3rd edn) of MP Jain's *Administrative Law In Malaysia & Singapore* [1997] at pp. 652-653 which was relied on by the applicant:

> The order of *mandamus* is a command issued by the High Court asking an authority to perform a public duty imposed upon it by law... . *Mandamus* is also issued to keep subordinate bodies and officers exercising public functions within the limits of their jurisdiction. *Mandamus* can be issued to any type of body, quasi-judicial, legislative, administrative and in resect of any type of function. … *Mandamus* is thus a very wide remedy which is available against a public officer to see that he does his duty or act according to law.
>
> What can be enforced through *mandamus* is a duty of a public nature, the performance of which is imperative and not optional or discretionary with the concerned authority. … But *mandamus* will be issued if he refuses to exercise his power for wrong reasons, or on the ground that he has no such power while he has power under the law.

The answer to issue 5 is therefore in the affirmative.

Alternative Remedy

A final point was raised for the first respondent on the issue of alternative remedy. This has in fact been raised as part of the preliminary objection and abandoned by the first respondent. It is therefore not part of the agreed issues for determination by the court. No further ventilation would be required or necessary.

However, since it has been raised here, I would proceed to give it my anxious consideration now. It is trite law that alternative remedy is normally dealt with at leave stage: *R v. Secretary Of State For The Home Department, ex p Swati* [1986] 1 All ER 717, at p. 723j-724a. This was followed by the Court of Appeal in *Sykt Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v. Majlis Perbadanan Pulau Pinang* [1996] 3 CLJ 335 which has since been upheld by the Federal Court, on appeal: [1999] 3 CLJ 65 *supra*.

Leave in the instant case has been given *inter partes* and so it is binding on the parties herein: *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104.

In any event, the alternative remedy of appeal under s. 418 of the National Land Code 1965 is inapplicable as the rights of the applicant herein arise out of and are to be determined by reference to the JVA and letter of alienation and what is required to be done is purely a ministerial act of implementing the terms and the obligations undertaken by the first respondent.

The first respondent was not required to adjudicate or decide on any matter. The applicant is seeking title to its own land and the first respondent has the public duty to issue the title.

I shall now proceed to briefly refer to the authorities relied upon by the first respondent on this issue.

In *Semantan Estate, supra,* the appellant had a right to appeal against the decision of the High Court in refusing to hear the reference for land acquisition. *Mandamus* was refused by the then Supreme Court.

In *Manggai, supra,* the applicant had applied for a declaration, *inter alia,* that the resident's native court was *functus officio* and without jurisdiction to hear the case by way of appeal or otherwise and that the purported judgment delivered by that court was null and void. The applicant did not pursue his right of appeal to the native Court of Appeal. The High Court refused the application for a declaration and the Federal Court dismissed the appeal and affirmed the refusal by the High Court.

In *Kuluwante (An Infant), supra,* the plaintiff had not exhausted the alternative remedy of an appeal to the Minister and so the claim for declaration was refused.

In *Syarikat Harper Gilfillan, supra,* a prayer for declaration was refused as the plaintiff has not exhausted the right of appeal under s. 418 of the National Land Code 1965.

In *Jagdis Singh, supra, certiorari* was refused when the plaintiff has an alternative remedy under the Income Tax Act 1967.

In *Lim Kui Siam, supra,* at the leave stage, I refused the application for leave to issue *certiorari* as the applicants have not exhausted the appeal under s. 418 of the National Land Code 1965.

It is to be observed that all the aforesaid authorities cited for the first respondent do not have the same facts as in the instant case. Moreover, in the cases in which *mandamus* was prayed for, the stage for raising the issue of alternative remedy was at the threshold stage at which leave was sought. As stated above, this issue had been resolved at the leave stage. Apart from that, in the instant case, the central issue concerns the performance of a public duty ie, the ministerial act of issuing document of title to the subdivided portions pursuant to the JVA and the letter of alienation.

In the circumstances, I am unable to see how any of the aforesaid authorities could assist the first respondent in resisting the application in encl. (26). The authoritative *dictum* of the Federal Court in *Majlis Perbandaran Pulau Pinang*

v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan, supra, in my view applies to the facts of the instant case.

The applicant is seeking to enforce its rights of ownership to and to obtain document of title to the land. An issue of ownership of land is not a matter on which the first respondent had acted judicially or quasi-judicially or decided upon by the first respondent under s. 418. In *Tan Chiw Thoo v. Tee Kim Kuay, supra*, FC, two identical titles were issued for the same piece of land. A compromise was recorded before the collector conducted an enquiry. Counsel for the second title holder had argued that the compromise agreement was a "decision", by the collector, the emphasis for it having been a decision came from the word "ditetapkan", ie, "decided" in the passive voice.

Peh Swee Chin, FCJ (as he then was), said at p. 549i to 550a:

> We do not think the enquiry held by the said Collector is a Court of competent jurisdiction because the said Collector had not been given such power to adjudicate on such a dispute as to title under the Code.

His Lordship continued at p. 550f:

> We hold that the said agreement which was signed before the Collector at the enquiry is not a decision of the said Collector on the dispute to title, and even if it were, it would not have amounted to *res judicata*. We hold further that the dispute [as] to title in this case could be and was properly litigated in the Court below.

Conclusion

In the circumstances, based on the aforesaid grounds, I make an order in terms of the applicant's aplication in encl. (26).